

**DLA PIPER LLP (US)**  
SHIRLI FABBRI WEISS (Bar No. 079225)  
shirli.weiss@dlapiper.com  
401 B Street, Suite 1700  
San Diego, CA 92101-4297  
Tel: (619) 699-2700 | Fax: (619) 699-2701

NICOLAS MORGAN (Bar No. 166441)  
nicolas.morgan@dlapiper.com  
MATTHEW CAPLAN (Bar No. 260388)  
matthew.caplan@dlapiper.com  
1999 Avenue of the Stars, Suite 400  
Los Angeles, CA 90067-6023  
Tel: (310) 595-3000 | Fax: (310) 595-3300

DAVID PRIEBE (Bar No. 148679)  
david.priebe@dlapiper.com  
JEFFREY B. COOPERSMITH (Bar No. 252819)  
jeff.coopersmith@dlapiper.com  
2000 University Avenue  
East Palo Alto, CA 94303-2248  
Tel: (650) 833-2000 | Fax: (650) 833-2001

Attorneys for Defendant ERIC P. SIERACKI

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

MAINE STATE RETIREMENT  
SYSTEM, Individually and On  
Behalf of All Others Similarly  
Situating,

*Plaintiffs,*

vs.

COUNTRYWIDE FINANCIAL  
CORPORATION *et al.*,

*Defendants.*

No.: 2:10-CV-00302 MRP (MAN)

**ERIC P. SIERACKI'S REPLY IN  
SUPPORT OF MOTION TO STRIKE  
PORTIONS OF COMPLAINT**

Date: October 18, 2010  
Time: 11 AM  
Judge: Hon. Mariana R. Pfaelzer  
Courtroom: Courtroom 12  
Spring Street Courthouse

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1 **I. INTRODUCTION**

2 Eric Sieracki joined the motions to dismiss filed by the other defendants in  
3 this case, and also joins in their reply memoranda. He also moved the Court to  
4 strike selected paragraphs from the Amended Complaint that consist of allegations  
5 that Plaintiffs cut and pasted from complaints filed in other actions. Fed. R. Civ. P.  
6 11 prohibits this practice, and the appropriate remedy is to strike the paragraphs  
7 under Fed. R. Civ. P. 12(f).

8 In response to the motion to strike, Plaintiffs do not claim that they  
9 conducted any independent investigation of the bases for allegations in the other  
10 complaints they cite. That is, Plaintiffs do not claim that they examined the  
11 purported internal Countrywide documents alleged in the complaints in those cases,  
12 or that they spoke to the personal sources for the allegations in those complaints.  
13 Instead, Plaintiffs cite a litany of media reports and studies they reviewed and claim  
14 that these documents corroborate each other and the complaints in other cases.  
15 Plaintiffs' apparent argument is that they can make up for their lack of investigation  
16 by volume, by citing to multiple "sources" that they did not investigate. Put in  
17 other terms, Plaintiffs claim that if enough other people make accusations about  
18 Countrywide, so can they, even if they did not personally investigate the bases for  
19 what those other persons said.

20 In fact, many of the sources cited by Plaintiff do not mention Countrywide,  
21 or are news articles that merely report on government investigations and hence have  
22 no substantive value. But more importantly, Plaintiffs do not claim to have  
23 conducted an independent investigation as to the basis of any of the other sources  
24 they cite (including the supposed documents or "witnesses" on which those sources  
25 were based), just as they do not allege they have conducted such an investigation  
26 with respect to the complaints they cite. This is evident by distinction to the cases  
27 relied upon by Plaintiffs, in which the respective attorneys represented that they did  
28 more than Plaintiffs claim to have done here.

1 As Mr. Sieracki pointed out, allowing recycled unsubstantiated and un-  
2 investigated allegations to suffice undermines not only Rule 11, but also the  
3 reputation-defending purpose of Fed. R. Civ. P. 9(b). Plaintiffs cannot fall back on  
4 the argument that they did not need to undertake a Rule 11 investigation with  
5 respect to the allegations lifted from other complaints because those allegations are  
6 “facts,” as none of the cases from which the allegations are lifted have resulted in  
7 an adverse judgment or finding.

## 8 **II. ARGUMENT**

9 The paragraphs Mr. Sieracki requests the Court to strike consist of  
10 allegations lifted from complaints filed in other actions and government  
11 investigations. AC ¶¶ 13, 14, 103-111, 113-143. Plaintiffs state that they reviewed  
12 the following sources to corroborate these allegations and hence allege them in the  
13 Complaint: (1) materials for the Certificates at issue in this case and the  
14 Certificates’ rating histories; (2) monthly service or remittance reports issued in  
15 connection with the Certificates; (3) Countrywide’s SEC filings, press releases and  
16 other public statements; (4) media reports, congressional testimony and additional  
17 material; and (5) an SEC report regarding credit rating agencies. Opposition at  
18 87:6-18, *citing* AC at 1. Plaintiffs assert that this effort is enough. However, this  
19 does not constitute a sufficient pre-filing investigation with respect to the  
20 paragraphs at issue in the motion to strike.

### 21 **A. Many Of Plaintiffs’ Sources Do Not Mention Countrywide**

22 As a threshold matter, many of Plaintiffs’ supposedly corroborating sources  
23 cannot serve that purpose because they say nothing about Countrywide in  
24 particular, as distinguished from mortgage or financial markets in general.

25 For example, Plaintiffs cite a March 2008 Policy Statement of Financial  
26 Market Developments from the President’s Working Group on Financial Markets.  
27 Even as described by Plaintiffs, it refers to a supposed breakdown in underwriting  
28 standards for subprime mortgages, without mentioning Countrywide (let alone

1 purported internal practices at Countrywide). *See* Opposition at 88:5-11. Likewise,  
2 Plaintiffs cite the 2007 Mortgage Market Statistical Annual Volume I merely to  
3 support their allegation that the industry-wide market for ARMs increased between  
4 2001 and 2006. *Id.* at 88:12-15. While Plaintiffs allege that the 2006 and 2007  
5 Mortgage Fraud Reports included a study of three million residential mortgages (*id.*  
6 at 88:16-20), these reports were not specific to Countrywide.

7 The news articles Plaintiffs cite experience similar defects. Again, several  
8 do not mention Countrywide at all. For example, Plaintiffs assert that an April 6,  
9 2008 *New York Times* article reported that “Countrywide verified income with the  
10 IRS on only 3%-5% of all loans funded by the Company in 2006.” Opposition at  
11 88:27-89:3; 90:2-10. But the article does not mention Countrywide but rather  
12 focuses on Ameriquest, and quotes the Vice-President of Sales and Marketing at a  
13 company that handles filing of IRS verifications as saying “[m]y estimate was  
14 between 3 and 5 percent of all of the loans that were funded in 2006 were executed  
15 with [an IRS verification.].”<sup>1</sup> The remaining articles merely report on purported  
16 government investigations and hence have no probative value under Fed. R. Civ. P.  
17 12(f). *See* Opening Brief at 7:19-8:1 & n.8 & cases cited therein.

18 In *Freidus v. ING Groep N.V.*, No. 09 Civ. 1049 (LAK) (S.D.N.Y. Sept. 14,  
19 2010), attached as an Appendix to this brief, a District Court granted in substantial  
20 part a motion to dismiss a Securities Act of 1933 lawsuit alleging that an  
21 investment bank did not disclose the risks of mortgage-backed securities underlying  
22 the hybrid capital securities it sold. In so doing, the court found that allegations of  
23

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24 <sup>1</sup> Likewise, a January 12, 2008 *New York Times* article referenced by Plaintiffs  
25 focused on New Century Financial and described government investigations into  
26 the underwriters of mortgage backed securities (such as Lehman Brothers and  
27 Deutsche Bank). A January 27, 2008 *New York Times* article cited by Plaintiffs  
28 focused on the New York Attorney General’s investigation into whether the  
underwriters of mortgage-backed securities conducted sufficient due diligence. The  
March 23, 2008 *Los Angeles Times* article also focused on the purported lack of due  
diligence by underwriters.

1 mortgage industry-wide or market-wide troubles as of September 2007 were  
2 irrelevant when it came to pleading a claim as against the defendant and the  
3 mortgage loans it securitized, even under the liberal standards of Fed. R. Civ. P.  
4 8(a). Slip op. at 24-25. The same reasoning applies here to the sources relied upon  
5 by Plaintiffs that do not mention Countrywide or the allegations about Countrywide  
6 from the complaints in the other cases that are the subject of this motion to strike.

7 **B. Plaintiffs Did Not Investigate The Bases For The Allegations In**  
8 **The Complaints Or Any “Corroborating” Source**

9 Plaintiffs’ defense of their investigation suffers from a fundamental flaw. It  
10 is that Plaintiffs do not claim that they conducted any independent investigation of  
11 the bases for allegations in the other complaints they cite, which the instant motion  
12 seeks to strike. That is, Plaintiffs do not claim that they examined the purported  
13 internal Countrywide documents alleged in the complaints in those other cases, or  
14 that they spoke to the personal sources (be they anonymous sources or disclosed  
15 sources) for the allegations in those complaints. The same is true for the media and  
16 analytical sources that Plaintiffs proffer as corroboration.

17 Plaintiffs’ omission means that they did not conduct an independent  
18 investigation. The insufficiency of Plaintiffs’ investigation here is illustrated by  
19 contrast to the cases they cite. In *In re Connetics Corp. Sec. Litig.*, No. Civ.A. 07-  
20 02940 SI, 2008 WL 3842938 (N.D. Cal. Aug. 14, 2008), plaintiffs’ counsel  
21 contacted the witnesses quoted in the SEC complaint from which they copied  
22 allegations, and cited other anonymous sources on their own. *Id.* at \*4. Plaintiffs  
23 here do not claim to have taken either step.<sup>2</sup> In *Johns v. Bayer Corp.*, No.

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24 <sup>2</sup> Plaintiffs claim that “to the extent witnesses identified in other complaints are  
25 currently employed by any of the Defendants, such witnesses would be unavailable  
26 for Plaintiffs to contact.” Opposition at 90 n.50. The Amended Complaint,  
27 however, identifies numerous witnesses in the other complaints as former  
28 Countrywide employees. See AC ¶ 116 (identifying a “former California loan  
officer”); ¶ 123 (identifying “a former ‘Underwriter II’ (a Countrywide  
employment classification) in a Jacksonville, Florida processing center between

1 09CV1935, 2010 WL 2573493 (S.D. Cal. June 24, 2010), plaintiffs' counsel  
2 contacted the attorney in the other case from which she copied allegations, to  
3 discuss the basis for the claims in the other case. *Id.* at \*2. The attorney from the  
4 other case also made an appearance in the case at issue on the motion to strike. *Id.*  
5 The attorney also personally reviewed the medical studies that (unlike the articles  
6 cited in this case) referred to the defendant company and drug at issue, and formed  
7 the basis of her complaint. *Id.* Again, Plaintiffs' counsel does not claim to have  
8 taken these measures. In *Dubois v. U.S. Dept. of Agriculture*, 270 F.3d 77, 82 (1st  
9 Cir. 2001), the First Circuit denied a motion for sanctions (which Mr. Sieracki does  
10 not make here) and found that the attorneys satisfied their Rule 11 duty where  
11 throughout the litigation they engaged in extensive consultation with technical  
12 experts and, prior to filing, sent copies of every substantive submission to the  
13 expert to review for factual accuracy.<sup>3</sup> The other cases Plaintiffs cite are  
14 inapposite.<sup>4</sup>

15 \_\_\_\_\_  
16 June 2006 and April 2007"); ¶ 124 (identifying "a Senior Underwriter in Roseville,  
17 California, from September 2002 to September 2006"); ¶ 125 (identifying "an  
18 Executive Vice President of Production Operations and later an Executive Vice  
19 President of Process Improvement who worked at Countrywide for 17 years before  
20 leaving in October 2005"); *id.* (identifying "an underwriter from Long Island, New  
21 York at Countrywide between March 2000 and January 2007"); ¶ 129 (identifying  
22 "a supervising underwriter at Countrywide until mid-2005 who oversaw the  
23 underwriting operations in several states").

24 <sup>3</sup> Likewise, in *Kraemer v. Grant County*, 892 F.2d 686, 689-690 (7th Cir. 1990), an  
25 attorney satisfied Rule 11 because "he did all he reasonably could have done to  
26 investigate his client's account of events before the complaint was filed," including  
27 hiring a private investigator.

28 <sup>4</sup> *In re Cylink Sec. Litig.*, 178 F. Supp. 2d 1077, 1080-81 (N.D. Cal. 2001),  
involved a motion to dismiss, and the defendants did not challenge the plaintiffs'  
reliance on allegations lifted from an SEC complaint. In *RSM Production Corp. v.*  
*Fridman*, 643 F. Supp. 2d 382, 403-404 (S.D.N.Y. 2009), the paragraphs the  
defendant sought to strike included allegations based on sources other than the  
allegations lifted from other complaints, which is not the case in the present motion.  
In *Fraker v. Bayer*, No. Civ.A. F 08-1564 AWI GSA, 2009 WL 5865687 (E.D. Cal.  
Oct. 6, 2009), the court noted that it is appropriate for a complaint to refer to  
allegations in another complaint but not to rely entirely on another complaint as its



1           **C.    The Allegations From The Other Complaints Are Not “Facts”**

2           Plaintiffs’ fall-back argument is that they did not need to do any additional  
3 investigation into the allegations lifted from the other complaints because those  
4 allegations “have been legally tested and have been sustained by courts as sufficient  
5 to survive a Rule 12(b)(6) dismissal motion.” Opposition at 92:3-94:10.

6           However, as set forth in the Opening Brief, it is settled that content from  
7 and reference to “preliminary steps in litigation and administrative proceedings that  
8 did not result in adjudication on the merits or legal or permissible findings of fact  
9 are, as a matter of law, immaterial under Rule 12(f).” *See* Opening Brief at 7:19-  
10 8:1 & n.8 & cases cited therein; *see also RSM Production Corp.*, 643 F. Supp. 2d at  
11 403 (“paragraphs in a complaint that are either based on, or rely on, complaints in  
12 other actions that have been dismissed, settled, or otherwise not resolved, are, as a  
13 matter of law, immaterial within the meaning of Fed.R.Civ.P. 12(f)”) (quotations  
14 omitted). The denial of a motion to dismiss does not result in adjudication on the  
15 merits or legal or permissible findings of fact, and Plaintiffs cite no authority to the  
16 contrary. Thus, this argument fails as a matter of law.

17           Plaintiffs’ argument also fails because their failure to investigate the  
18 underlying bases of both the complaints undermines their ability to rely on the  
19 rulings on which they would rely. As this Court is aware from its own experience,  
20 it was only due to the presence of the type of underlying internal document and  
21 anonymous source allegations that Plaintiffs did not investigate here that  
22 complaints were found to have been pleaded in those other cases. For example, the  
23 Court wrote in its opinion in the class action case that “[i]t cannot be emphasized  
24 enough that in the vast majority of cases” the challenged statements regarding  
25

26           \_\_\_\_\_

27 sole basis. The court the found that the allegations at issue were completely lifted  
28 from another complaint and granted the motion to strike on that basis, and hence  
did not reach the issue of what type of sources are sufficient to corroborate  
allegations lifted from another complaint. *Id.* at \*3.



1 Countrywide's internal underwriting processes "would be nonactionable puffery."  
2 *In re Countrywide Fin. Deriv. Litig.*, 554 F. Supp. 2d 1044, 1154 (C.D. Cal. 2008).  
3 It was only due to the presence of anonymous sources and internal document  
4 allegations that the Court varied from this normal rule. *Id.* at 1186 ("The Court  
5 draws these inferences [of alleged falsity] from the public sources and Countrywide  
6 internal documents cited in the CAC and from the corroboration furnished by the  
7 CAC's numerous confidential witness accounts."). Judge Walter's opinion in the  
8 SEC matter followed course. Here, Plaintiffs do not claim to have investigated the  
9 purported internal documents or confidential witnesses that were so vital to the  
10 Court's ruling, yet nevertheless claim they have conducted an investigation  
11 sufficient to allow them to copy allegations from the class action case and other  
12 cases into their own Complaint.

13 Nor do Plaintiffs effectively distinguish *SRM Global Fund Ltd. Partnership*  
14 *v. Countrywide Fin. Corp.*, No. 09 Civ. 5066 (RMB), 2010 WL 2473595 (S.D.N.Y.  
15 June 17, 2010), as the only Countrywide case that has proceeded to judgment—in  
16 the defendants' favor. Plaintiffs aver that the *SRM* complaint did not challenge  
17 securitization offering documents. Opposition at 93 n.5. But neither did the  
18 securities or derivative cases adjudicated by this Court, nor for that matter the SEC  
19 action pending before Judge Walter. If this distinction is so important to Plaintiffs,  
20 then they should not have alleged these actions in their Complaint.

### 21 **III. CONCLUSION**

22 For the reasons set forth above and in the motion to dismiss of the other  
23 defendants, the Complaint against Mr. Sieracki should be dismissed, and his motion  
24 to strike should be granted.

25 Respectfully submitted,

26 September 27, 2010

DLA PIPER LLP (US)

27 By: /s/ David Priebe

28 Attorneys for Defendant ERIC SIERACKI